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IN THE

Supreme Court of the United States

CITY OF ALBANY POLICE DEPARTMENT
and WILLIAM BONNANI,

Petitioners,

v.

PHILLIP LEWIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the jury have been permitted to hear evidence regarding the prior civilian complaints lodged against Petitioner Bonanni as evidence against both the City and the individual defendant?

2. Should the causes of action against the municipal defendant have been bifurcated from those against the individual defendant, William Bonnani, in light of the well-established practice of bifurcation in cases pursuant to 42 U.S.C. § 1983?

3. Did the Trial Court erroneously refuse to reduce the award for punitive damages in light of this Court's recent rulings on the issues?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE ...	3
42 U.S.C. § 1983. Civil action for deprivation of rights	3
Federal Rules of Civil Procedure Rule 42(b), 28 U.S.C.A.	3
Federal Rules of Evidence Rule 403, 28 U.S.C.A.	4
Federal Rules of Evidence Rule 404(b), 28 U.S.C.A.	4

Contents

	Page
STATEMENT OF THE CASE	5
A. Facts giving rise to this case	5
B. The District Court proceeding	7
C. The Appellate Court proceeding	9
REASONS FOR GRANTING THE PETITION	10
I. Review Is Warranted Because The Second Circuit Court Of Appeals Has Sanctioned The District Court's Departure From Standard Practice On The Issue Of The Admissibility Of Prior Civilian Complaints Against An Individual Defendant At Trial, Which Is An Important Issue That Needs To Be Clarified By This Court	10
II. Review Is Warranted Because The Second Circuit Court Of Appeals Has Sanctioned The District Court's Departure From Standard Practice On The Issue Of The Admissibility Of Prior Civilian Complaints Against A Municipality At Trial, Which Is An Important Issue That Needs To Be Clarified By This Court	14

Contents

Page

III. Review Is Warranted Because The Second Circuit Court Of Appeals Has Sanctioned The District Court's Departure From Standard Practice On The Issue Of Bifurcation Of Causes Of Action Against Law Enforcement Officials And Municipalities Pursuant To 40 U.S.C. § 1983, Which Is An Important Issue That Needs To Be Clarified By This Court ... 16

IV. Review Is Warranted Because The Second Circuit Court Of Appeals Has Sanctioned The District Court's Departure From Standard Practice On The Issue Of Punitive Damages, As Well As Because The Second Circuit Court Of Appeals Has Deviated From This Court's Ruling In *Exxon Shipping Co. v. Baker* .. 18

CONCLUSION 22

TABLE OF APPENDICES

Page

Appendix A — Decision Of The United States Court Of Appeals For The Second Circuit Filed May 7, 2009 ..... 1a

Appendix B — Memorandum Decision And Order Of The United States District Court For The Northern District Of New York Dated April 24, 2008 ..... 5a

Appendix C — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Filed July 13, 2009 ..... 36a

TABLE OF CITED AUTHORITIES

Page

Cases

Adidas America, Inc. v. Payless Shoesource, Inc.,
2008 WL 4279812 (D.Or., 2008) 21

Amato v. City of Saratoga Springs,
972 F. Supp. 120 (N.D.N.Y. 1997) 16

Berkovich v. Hicks,
922 F.2d 1018 (2d Cir. 1991) 10, 14

Carson v. Syracuse,
1993 U.S. Dist. LEXIS 9508
(N.D.N.Y. 1993) 17

Daniels v. Loizzo,
178 F.R.D. 46 (S.D.N.Y. 1998) 17

Duke v. County of Nassau,
2000 U.S. Dist. LEXIS 22415
(S.D.N.Y. 2000) 17

Exxon Shipping Co. v. Baker,
128 S.Ct. 2605 (U.S. 2008) 18, 20, 21

Gragg v. International Management Group (UK), Inc.,
2009 WL 1140490 (N.D.N.Y., 2009) 21

Hirsh v. Lecuona,
2008 WL 2795859 (D.Neb., 2008) 20

Cited Authorities

Page

Hynes v. LaBoy,
887 F. Supp. 618 (S.D.N.Y. 1995) 12

JCB, Inc. v. Union Planters Bank, NA,
539 F.3d 862 (8th Cir., 2008) 21

Jurinko v. Medical Protective Co.,
305 Fed.Appx. 13 (3d Cir., 2008) 21

Lewis v. City of Albany Police Dept.,
547 F.Supp.2d 191 (N.D.N.Y., 2008) 1, 9

Lewis v. City of Albany Police Dept.,
No. 08-2722-cv (2d Cir., May 7, 2009) 1

Lewis v. Triborough Bridge and Tunnel Authority,
No. 97 Civ. 0607, 2000 WL 423517
(S.D.N.Y. 2000) 17

Lisa's Party City, Inc. v. Town of Henrietta,
185 F.3d 12 (2d Cir. 1999) 12

Marcel v. City of New York,
88 Civ. 7017, 1990 U.S. Dist. LEXIS 4094
(S.D.N.Y. Apr. 10, 1990) 11, 14

Mendez-Matos v. Municipality of Guaynabo,
557 F.3d 36 (1st Cir., 2009) 21

Cited Authorities

Page

Norris v. New York City College of Technology,
2009 WL 82556 (E.D.N.Y., 2009) 21

Peters v. Rivers Edge Min., Inc.,
2009 WL 804116 (W.Va., 2009) 21

Ricketts v. City of Hartford,
74 F.3d 1397 (2d Cir. 1996) 10

Schwenk v. Kavanaugh,
4 F. Supp. 2d 116 (N.D.N.Y. 1998) 19

Shaw v. City of New York,
1997 U.S. Dist. LEXIS 4901 11

Sealey v. Fishkin,
96 Civ. 6303, 1998 U.S. Dist. LEXIS 20142
(E.D.N.Y. Dec. 2, 1998) 11, 14

Sostre v. McGinnis,
442 F.2d 178 (2d Cir. 1971) 18

Swift v. Mauro,
2008 WL 2704906 (N.D.N.Y. 2008) 13

Thompson v. City of New York,
2006 U.S. Dist. LEXIS 4797
(S.D.N.Y. 2006) 10-11, 14

United States v. Peterson,
808 F.2d 969 (2d Cir. 1987) 10

Cited Authorities

Page

Valenzuela v. Abate,
No. 92 Civ. 9309, 1996 WL 22373
(S.D.N.Y. 1996) 12

Vilku v. City of New York,
2009 WL 537495 (E.D.N.Y. 2009) 13

Rules

F.R.C.P. 42(b) 3

F.R.E. 403 ..... *passim*

F.R.E. 404(b) ..... *passim*

Statutes

28 U.S.C.A. §1254(1) 2

28 U.S.C. §1983 17

42 U.S.C. §1983 ..... *passim*

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of New York upon the Petitioners' motions for judgment as a matter of law, or, in the alternative, a new trial is reported in *Lewis v. City of Albany Police Dept.*, 547 F.Supp.2d 191 (N.D.N.Y., 2008), and is reprinted in the Appendix hereto, pp. 5a-35a.

The Summary Order of the United States Court of Appeals for the Second Circuit, upholding the Decision and Order of the District Court, filed May 7, 2009, is unpublished, *Lewis v. City of Albany Police Dept.*, No. 08-2722-cv (2d Cir., May 7, 2009) (unpublished), and is reprinted in the Appendix hereto, pp. 1a-4a.

The Summary Order of the United States Court of Appeals for the Second Circuit, denying rehearing and rehearing *en banc*, filed July 13,2009, is unpublished, *Lewis v. City of Albany Police Dept.*, No. 08-2722-cv (2d Cir., July 13, 2009), and is reprinted in the Appendix hereto, pp. 36a-37a.

JURISDICTION

On February 9, 2004, Respondent brought suit against the Petitioners in the United States District Court for the Northern District of New York, alleging the Petitioners and others had violated his constitutional rights to be free from excessive force and denied his rights to equal protection under the law, pursuant to 42 U.S.C. § 1983. Respondent also alleged that the municipality was liable for failure to adequately

investigate prior civilian complaints against Petitioner Officer William Bonanni and discipline him based on such.

On February 27, 2008, a jury verdict was returned in favor of the Respondent, awarding $65,000.00 in compensatory damages against the Petitioners jointly and an unspecified amount in punitive damages against Petitioner Bonanni. On March 6, 2008, a hearing was held on the issue of punitive damages, wherein the jury awarded the Respondent an additional $200,000.00. The District Court denied Petitioners' motions for judgment as a matter of law or, in the alternative, for a new trial on April 24, 2008. *See,* App. B. Final Judgments were entered in this action on the 20th day of May 2008. The Petitioners filed a joint Notice of Appeal on May 29, 2008 with the United States Court of Appeals for the Second Circuit.

On May 7, 2009, the United States Court of Appeals for the Second Circuit issued a Summary Order, upholding the Decision and Order of the District Court in its entirety. *See,* App. A.

On July 13, 2009, the United States Court of Appeals for the Second Circuit issued a Summary Order, denying the Petitioners' request for rehearing and/or rehearing *en banc. See,* App. C.

The jurisdiction of the Court to review the Judgment of the Second Circuit is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rules of Civil Procedure Rule 42(b), 28 U.S.C.A.

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-

party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Federal Rules of Evidence Rule 403, 28 U.S.C.A.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rules of Evidence Rule 404(b), 28 U.S.C.A.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

A. Facts giving rise to this case

This action arises out of the arrest of the Respondent, Phillip Lewis, on November 23, 2002. On the evening of November 23, 2002, Larry Ibrahim knocked on the first floor apartment of 195 Livingston Avenue, Albany, New York, to visit Tasia Brown. Respondent answered Ms. Brown's door and an altercation between the two men took place. During this fight, Ibrahim suffered a head wound and left the vicinity.

Ibrahim then flagged down an unmarked Albany Police Department ("APD") patrol car. The officers inside were Petitioner William Bonanni and former defendant Lawrence Heid. Ibrahim informed the officers that a man, later known to be the Respondent, pistol-whipped him. The officers placed Ibrahim in the back of the car and instructed him to direct them to the scene of the assault. Petitioner Bonanni and Officer Heid radioed in "a person with weapon situation at 195 Livingston Avenue" to the dispatcher. Shortly thereafter, a domestic incident call was placed due to screaming coming from within 195 Livingston Avenue.

Officer Heid joined approximately ten other officers in setting up a perimeter around the building, while Petitioner Bonanni remained inside the patrol car with the injured victim, as is APD policy.

Shortly after the perimeter was set in place by the APD, Respondent exited the building. Victim Ibrahim,

while sitting in the police vehicle with Petitioner Bonanni, identified the Respondent as his assailant. Petitioner Bonanni then radioed the positive identification to the officers on the street. Respondent was then ordered to freeze, but, admittedly, continued to walk and kept his hands either in his pockets or near the waistband of his pants. After approximately 30-60 seconds of noncompliance, Respondent stopped and knelt on the ground as ordered.

In response to a question by Officer Joseph Shanahan, Respondent admitted to having a weapon in his possession and started to reach into his pocket. Respondent was then surrounded by the officers on the scene and forcibly brought to the ground. Despite orders to spread his arms out to his sides, Respondent struggled with the officers and attempted to reach for something in the vicinity of the waistband of his pants. The officers eventually gained control of Respondent's arms and handcuffed him. Respondent's pockets were then searched, revealing that he had a .380 Davis Industries pistol, which was loaded with six live rounds, one of which was in the gun's chamber, and a twenty round box of ammunition in his possession.

Throughout this incident Petitioner Bonanni remained inside the patrol vehicle with the victim, Larry Ibrahim. At no point in time did Officer Bonanni exit the vehicle to assist the other officers with the Respondent's physical detention and arrest.

Some time during the struggle to control the Respondent, he sustained a minor abrasion to his right cheek. He was initially booked at the APD South Station

where he was treated by EMS, but was then brought to Albany Memorial Hospital as a precaution. At the hospital, Dr. Olsen diagnosed the Respondent with a minor abrasion and a headache secondary to the injury. She noted in her report that the Respondent had no nerve damage and released the Respondent to APD custody.

Respondent was charged with burglary in the first degree, unlawful imprisonment in the second degree, three counts of endangering the welfare of a child, one count of assault in the third degree, two counts of criminal possession of a weapon in the second degree, one count of menacing in the second degree, one count of assault in the second degree, and one count of criminal possession of a weapon in the third degree. Officers Bonanni and Heid, as the officers initiating the investigation, signed the charges. Respondent pled guilty to the criminal possession of a weapon charges and has served his time in jail.

B. The District Court proceeding

On or about February 9, 2004, Respondent commenced an action alleging Petitioner Officer William Bonanni subjected him to excessive force and violated his equal protection rights during the course of the arrest. The sole basis for the Respondent's equal protection claim was a series of eight prior civilian complaints against Officer Bonanni, which were deemed to be "unfounded" or "unsubstantiated" after full investigations by the Albany Police Department's Office of Professional Standards ("OPS"), with a single exception. Respondent also alleged that the municipal

Petitioner was liable for failure to adequately investigate these complaints and discipline Officer Bonanni based on such complaints.

Petitioner City of Albany brought a motion to bifurcate the causes of action against Petitioner Bonanni from those against the municipality on the basis that the prior "unfounded" and "unsubstantiated" complaints were inadmissible as against Petitioner Bonanni and that the prejudice involved in permitting a jury to hear of these complaints would significantly outweigh any probative value. Further, as liability against the City of Albany was directly predicated upon a finding of liability against Officer Bonanni, the admission of the prior complaints at a single trial of all causes of action would directly prejudice the City's defense. The District Court denied Petitioner's motion on January 25, 2008.

Prior to the commencement of the proceedings, Respondent and the Petitioner, City of Albany, made competing motions in limine, regarding the introduction of prior civilian complaints. The Trial Court denied the Petitioner's motion and permitted the jury to hear the evidence regarding the complaints.

On February 27, 2008, a jury verdict was reached in favor of the Respondent, awarding $65,000.00 in compensatory damages against the defendants jointly and an unspecified amount in punitive damages against Petitioner Bonanni. On March 6, 2008, a hearing was held on the issue of punitive damages, wherein the jury awarded the Respondent an additional $200,000.00. The District Court denied defendants' motions for judgment as a matter of law or, in the alternative, for a new trial

on April 24, 2008. The District Court also awarded Respondent attorneys' fees in the amount of $39,249.00 and $3,180.69 in costs on May 20, 2008. Final Judgments were entered in this action on the 20th day of May 2008.

C. The Appellate Court proceeding

The Petitioners filed a joint Notice of Appeal on May 29, 2008. On May 7, 2009, a Summary Order was issued, denying the Respondents' appeal in its entirety, as "[w]e see no merit in any of these challenges substantially for the reasons stated in the Memorandum-Decision and Order of the District Court denying defendants' Rule 50(b) and 59 motions. *See, Lewis v. City of Albany Police Dep't*, 547 F. Supp. 2d 191 (N.D.N.Y. 2008)."

Petitioners thereafter filed a petition for a rehearing or rehearing *en banc*. The Second Circuit denied this petition through a Summary Order on July 13, 2009.

REASONS FOR GRANTING THE PETITION

I.

REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM STANDARD PRACTICE ON THE ISSUE OF THE ADMISSIBILITY OF PRIOR CIVILIAN COMPLAINTS AGAINST AN INDIVIDUAL DEFENDANT AT TRIAL, WHICH IS AN IMPORTANT ISSUE THAT NEEDS TO BE CLARIFIED BY THIS COURT.

The Second Circuit Court of Appeals held by way of a Summary Order dated May 7, 2009, that the appeals of the Petitioners should be denied in their entirety "for the reasons stated in the Memorandum-Decision and Order of the District Court denying defendants' Rule 50(b) and 59 motions." In holding so, the Second Circuit overlooked its earlier holdings that prior unfounded and/or unsubstantiated civilian complaints *may* be admissible against a municipality, but are not admissible against the defendant officer. *Ricketts v. City of Hartford*, 74 F.3d 1397, 1414 (2d Cir. 1996); *Berkovich v. Hicks*, 922 F.2d 1018, 1022 (2d Cir. 1991); *United States v. Peterson*, 808 F.2d 969, 974 (2d Cir. 1987).

It has been consistently held that unsubstantiated and/or unfounded civilian complaints are irrelevant and improper similar act evidence, whose probative value did not outweigh the potential prejudice to the defendant officer under Federal Rules of Evidence Rules 403 and 404(b). *Thompson v. City of New York*, 2006 U.S.

Dist. LEXIS 4797 (S.D.N.Y. 2006), *citing Sealey v. Fishkin*, 96 Civ. 6303, 1998 U.S. Dist. LEXIS 20142, at **9-10 (E.D.N.Y. Dec. 2, 1998); *Marcel v. City of New York*, 88 Civ. 7017, 1990 U.S. Dist. LEXIS 4094, at *23 (S.D.N.Y. Apr. 10, 1990). Specifically, unsubstantiated prior complaints do not demonstrate "'motive, opportunity, intent or the like,' but, instead and impermissibly, serve to show that, because the defendant was previously investigated for excessive force, the fact-finder should believe plaintiff over defendant—'that is the very use of this evidence, however, that Rule 404(b) is designed to prevent.'" *Id.*, *citing Shaw v. City of New York*, 1997 U.S. Dist. LEXIS 4901, at **17-18.

By summarily relying on the facts as presented in the District Court's decision, the Second Circuit failed to take notice of the facts that the prior civilian complaints against Officer Bonnani bear no similarities to the incident as alleged by the Respondent, other than those endemic to any other routine arrest and the fact that the complainants were of African-American descent. Indeed, in similar circumstances the Southern District of New York has held:

> "The similarities plaintiff claims between the three incidents are the factual predicates seemingly found in every case where excessive force is alleged—they evince no particular plan, scheme or similarity connecting them to the particular conduct alleged in the complaint. As a result, we are unconvinced that the incidents' relevance to those alleged in the complaint under a motive, intent, or

> plan theory, but instead believe they can only be used for the improper purpose for attempting to prove [defendant's] propensity to engage in unlawful uses of force against inmates. *Valenzuela v. Abate*, No. 92 Civ. 9309, 1996 WL 22373, at *2 (S.D.N.Y. 1996); *citing Hynes v. LaBoy*, 887 F. Supp. 618, 628-629 (S.D.N.Y. 1995). (Excluding records of prior conduct because "such records are inadmissible for the purposes of showing that a party was a violent person and therefore, must have been the aggressor who precipitated the assault.")

The prior civilian complaints at issue do not serve to prove either requirement for an equal protection cause of action, *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16 (2d Cir. 1999), since none of the prior complaints involved persons similarly situated, other than the tenuous argument that they were arrestees, nor do they demonstrate that the Respondent's arrest for, *admittedly* assaulting Larry Ibrahim and possession of a weapon was based upon race. As the *record* clearly and substantially reflects, but the underlying decision of the trial court does not, each of the prior civilian complaints are based on significantly different facts. The only commonality between the Respondent's allegations and the unfounded, unsubstantiated prior civilian complaints is that all complainants are minorities who were arrested.

Further, there is great confusion within the courts of the Second Circuit as to whether and/or when such prior unfounded and/or unsubstantiated complaints may

be entered into evidence against an individual officer. In the time since the District Court's decision in this matter, two decisions have been issued with facts substantially similar to those in the instant action—one permitted the admission of prior civilian complaints (*Vilku v. City of New York*, 2009 WL 537495 (E.D.N.Y. 2009)) and the other did not (*Swift v. Mauro*, 2008 WL 2704906 (N.D.N.Y. 2008)). In light of the disparity between these cases, as well as between the instant action and the well-documented case law on the subject of the inadmissibility of prior unfounded and unsubstantiated civilian complaints against an individual officer, it is clear the admissibility of such complaints needs to be addressed by this Court in order to establish a uniform application of Rules 403 and 404(b) of the Federal Rules of Evidence in cases against law enforcement officials brought pursuant to 42 U.S.C. § 1983.

II.

REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM STANDARD PRACTICE ON THE ISSUE OF THE ADMISSIBILITY OF PRIOR CIVILIAN COMPLAINTS AGAINST A MUNICIPALITY AT TRIAL, WHICH IS AN IMPORTANT ISSUE THAT NEEDS TO BE CLARIFIED BY THIS COURT.

In addition to the issue of the admissibility of the prior unfounded and unsubstantiated civilian complaints against Petitioner Bonnani, review by this Court is necessary to address the admissibility of such complaints against a municipality. *Berkovich*, 922 F.2d at 1022-23 (2d Cir. 1991); *Thompson*, (Civilian complaints that were ascertained to be either unfounded or unsubstantiated after investigation are properly excluded under Rule 403 and Rule 404(b)); *Sealey*, at **9-10 (unsubstantiated civilian complaints do not suffice to prove Monell claim); *Marcel*, at *23 (Unsubstantiated civilian complaints do not demonstrate a breach of a municipality's duty to train or supervise its police.); *Law*, 613 F. Supp. at 262-63 (Unsubstantiated civilian complaints do not demonstrate a breach of a municipality's duty to train or supervise its police).

As detailed at length above, by relying solely on the reasoning in the District Court's Memorandum-Decision and Order, the Second Circuit Court of Appeals overlooked the record evidence set forth by the defendants. This evidence clearly established that the

prior unfounded and unsubstantiated civilian complaints lodged against Officer Bonnani were not strikingly similar to the incident alleged by the Respondent. Rather, the similarities between each of the prior complaints and the incident alleged by the Respondent are typical of any arrest. Moreover, said prior complaints were thoroughly investigated by the Office of Professional Standards and were each determined to be unfounded or unsubstantiated, which are inadmissible in the Second Circuit to demonstrate a breach of a municipality's duty to train or supervise its officers.

Accordingly, it is clear the admissibility of prior unfounded and unsubstantiated complaints lodged by civilians against a law enforcement official needs to be addressed by this Court in order to establish a uniform application of Rules 403 and 404(b) of the Federal Rules of Evidence in cases against municipal entities brought pursuant to 42 U.S.C. § 1983.

III.

REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM STANDARD PRACTICE ON THE ISSUE OF BIFURCATION OF CAUSES OF ACTION AGAINST LAW ENFORCEMENT OFFICIALS AND MUNICIPALITIES PURSUANT TO 40 U.S.C. § 1983, WHICH IS AN IMPORTANT ISSUE THAT NEEDS TO BE CLARIFIED BY THIS COURT.

As detailed at length above, the prior unfounded and unsubstantiated civilian complaints were not admissible against Officer Bonnani, as consistent with the case law of the Second Circuit. The Petitioners also contend that the majority of the case law in the Second Circuit prohibits the admission of such complaints against the City of Albany. However, should this Court grant certiorari and determine that the prior complaints were admissible against the municipality, review is necessary to clarify the rules as to bifurcation during a 42 U.S.C. § 1983 action against an officer and a municipality.

The District Court and the Second Circuit Court of Appeals have overlooked the long-standing rule in the Second Circuit that bifurcation is "particularly suited" to Section 1983 claims. *Amato v. City of Saratoga Springs*, 972 F. Supp. 120, 124 (N.D.N.Y. 1997). Evidence regarding past misconduct that is admissible against a municipality "would justify, if not compel, bifurcation" based upon the likelihood that such evidence "might be

improperly considered by the jury as proof of the violent propensity and character of the individual defendants." *Id.* "In fact, the majority of cases in which separate trials are granted for employers and employees involve 28 U.S.C. § 1983 claims, which require that the employee's personal liability be established before considering whether a *Monell* claim will lie against a municipal employer." *Lewis v. Triborough Bridge and Tunnel Authority*, No. 97 Civ. 0607, 2000 WL, 423517, at *2 (S.D.N.Y. 2000), at footnote 2; *Carson v. Syracuse*, 1993 U.S. Dist. LEXIS 9508 (N.D.N.Y. 1993); *Duke v. County of Nassau*, 2000 U.S. Dist. LEXIS 22415, 2-3 (S.D.N.Y. 2000), *Daniels v. Loizzo*, 178 F.R.D. 46, 47-48 (S.D.N.Y. 1998).

It is clear that the admission of the prior unfounded and unsubstantiated complaints and the failure to bifurcate the proceedings prejudiced both of the Petitioners. The improper admission of complaints against the City of Albany in a non-bifurcated trial created an impermissible impression that Officer Bonnani had a pattern and practice of assaulting minorities during the course of arrests. Conversely, the City of Albany was prejudiced by the lack of bifurcation, as a finding in Officer Bonnani's favor would have obviated the need for a trial against the municipality. Accordingly, review should be permitted on whether the common practice of bifurcation in § 1983 cases should be the rule in all such cases.

IV.

REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS HAS SANCTIONED THE DISTRICT COURT'S DEPARTURE FROM STANDARD PRACTICE ON THE ISSUE OF PUNITIVE DAMAGES, AS WELL AS BECAUSE THE SECOND CIRCUIT COURT OF APPEALS HAS DEVIATED FROM THIS COURT'S RULING IN *EXXON SHIPPING CO. v. BAKER.*

Certiorari is also warranted to establish a uniform set of rules on the issue of damages, as both the District Court and the Second Circuit Court of Appeals have gone against standard practice with the awarding of punitive damages in the instant action. The lower courts have also failed to address or apply this Court's 2008 ruling in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (U.S. 2008).

The District Court and the Second Circuit Court of Appeals failed to comply with the standard practices concerning punitive damages when an individual defendant is being indemnified, as well as neglecting to address this Court's recent holding in *Exxon Shipping* on the issue of punitive damages.

The purpose of awarding punitive damages in a 1983 case is to act as a deterrent to the alleged wrongdoer. *Sostre v. McGinnis*, 442 F.2d 178, 204 (2d Cir. 1971). Thus, if a punitive damages award is going to have minimal impact on the wrongdoer, it has been held to be unwarranted. *Id.*

In a similar matter to the one at hand, the presiding judge at the District Court level has ruled that punitive damages are not a deterrent in situations where the defendant will be indemnified by his employer. *Schwenk v. Kavanaugh*, 4 F. Supp. 2d 116 (N.D.N.Y. 1998). Specifically, the District Court stated, "because Ulster County would pay any punitive damage award assessed against the defendant, a large monetary award would not serve as a deterrent to them". *Id.* Based upon the negative publicity the trial on liability incurred, the Court held that the negative publicity was an appropriate deterrent in light of the indemnification agreement and limited the punitive damages award to $1.00. *Id.*

The facts in the instant matter mirrored those in *Schwenk*. The jury ascertained that punitive damages were to be assessed against Petitioner Bonanni. Under the terms and conditions of the collective bargaining agreement, the City of Albany will indemnify Officer Bonanni for any punitive damages awarded. Between the jury's verdict on January 27, 2008 and the hearing on the issue of punitive damages, the Albany *Times Union* has reported with a front page article regarding the findings against Officer Bonanni and that he was to stand further trial on the issue of punitive damages on March 10, 2008. Likewise, lead reports were carried by all five television news stations (CBS 6, NBC 13, ABC 10, FOX 23 and Local News 9 24-hour news), as well as newspapers, the *Troy Record* and *Schenectady Gazette*. Each of these media outlets subsequently carried significant pieces on the jury's $200,000.00 punitive damages award.

Accordingly, certiorari is necessary to establish a uniform rule on the important issue of punitive damages where the defendant will be indemnified, particularly in cases like the one at hand where the taxpayers will ultimately bear the burden of paying the punitive damages.

Further, neither the May 7, 2009 Summary Order of the Second Circuit, nor the underlying decision of the District Court address the applicability of this Court's holding in *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (U.S. 2008), that punitive damages should be predictable and adhere to a 1:1 ratio with any compensatory damages awarded. This issue was briefed extensively by the defendants, but not discussed by either Court.

As reasoned by the Court in *Exxon*, a ratio greater than 1:1 is excessive, as "the size of the underlying compensatory damages does not bespeak economic inadequacy." *Id.* at Footnote 27. Similarly, in the present case, adhering to a 1:1 ratio does not result in economic inadequacy in light of the jury's compensatory award of $65,000.00. Therefore, the punitive damages awarded should be reduced to be in line with the median ratio held to be valid by this Court, as any award in excess of this ratio should be considered "sport." *Id.*

Post *Exxon*, courts throughout the country are consistently reducing punitive damages to be in line with the 1:1 ratio set forth by the Supreme Court. *See*, *Hirsh v. Lecuona*, 2008 WL 2795859, *5 (D.Neb., 2008) (In a workers' compensation case, punitive damages of $350,000.00 appropriate when compensatory damages

awarded were $391,000.00); *Jurinko v. Medical Protective Co.*, 305 Fed.Appx. 13, 27 (3d Cir., 2008) (1:1 ratio for punitive to compensatory damages appropriate in an insurance bad faith cause of action); *Norris v. New York City College of Technology*, 2009 WL 82556, *8 (E.D.N.Y., 2009) (Eastern District of New York was unprepared to address applicability of 1:1 ratio when Court held that punitive damages of $25,000.00 was appropriate in a retaliatory discharge case when compensatory damages were $250,000.00); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir., 2009) (1:1 ratio appropriate in § 1983 case); *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 876 (8th Cir., 2008) (1:1 ratio appropriate in conversion case); *Gragg v. International Management Group (UK), Inc.*, 2009 WL 1140490, *4 (N.D.N.Y., 2009) (In an action alleging RICO violations, unfair competition, and breach of fiduciary duties, punitive damages of $3,000,000.00 were appropriate when compensatory damages were $4,764,810.00); *Adidas America, Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, *15 (D.Or., 2008) (Action for collection of royalties holds that ratio of 1:1 or less is appropriate); *Peters v. Rivers Edge Min., Inc.*, 2009 WL 804116, *804116, (W.Va., 2009) (In an employment retaliation case, ratio of 1.13:1 was close enough to 1:1 to be upheld as reasonable).

In light of the fact that there is a clear shifting of the law throughout the country with regard to the amount of punitive damages that should permissibly be awarded in the wake of this Court's decision in *Exxon*, it is clear the Second Circuit Court of Appeals failed to apply the recent precedential findings of this Court, as well as those of other Circuits throughout the country

and certiorari must be granted to establish the Court's position on punitive damages.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MAY 7, 2009

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

No. 08-2722-cv

PHILLIP LEWIS,

Plaintiff-Appellee,

-v.-

CITY OF ALBANY POLICE DEPARTMENT, WILLIAM BONNANI,

Defendants-Appellants.

Present

WILFRED FEINBERG,
JOSÉ A. CABRANES,
Circuit Judges.

J. GARVAN MURTHA,
*District Judge.**

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* The Honorable J. Garvan Murtha, of the United States District Court for the District of Vermont, sitting by designation.

Appendix A

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Northern District of New York (David N. Hurd, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be AFFIRMED.

Defendants-appellants the City of Albany Police Department and William Bonnani, a police officer, appeal from a May 20, 2008 judgment entered in favor of plaintiff-appellee Phillip Lewis on his claims of excessive force and race discrimination arising from his November 23, 2002 arrest. A jury awarded Lewis compensatory damages in the amount of $65,000 and punitive damages in the amount of $200,000, holding the Police Department liable pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The District Court also awarded Lewis $47,189.69 in attorneys' fees and costs. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

The Police Department and Bonnani challenge the judgment of the District Court on many of the same grounds raised in their motions for judgment as a matter of law or a new trial pursuant to Rules 50(b) and 59, respectively, of the Federal Rules of Civil Procedure. Specifically, they challenge the District Court's rulings on (1) bifurcation, (2) the admission of prior complaints and a perjury charge pertaining to Bonnani, (3) jury

selection, (4) the sufficiency of the evidence, (5) the inclusion of an oral addition to the verdict form, (6) defendants' request for a qualified immunity charge, and (7) whether the damages award was excessive. We see no merit in any of these challenges substantially for the reasons stated in the Memorandum-Decision and Order of the District Court denying defendants' Rule 50(b) and 59 motions. *See Lewis v. City of Albany Police Dep't*, 547 F.Supp.2d 191 (N.D.N.Y.2008). In addition, we perceive no error, much less abuse of discretion, in the decision of the District Court to deny defendant's motion for a new trial.

Defendants also contend that they should have been allowed to introduce evidence that, prior to his arrest, Lewis had beaten his girlfriend. This information is relevant, defendants argue, because it would have made "clear to the jury that a reasonable officer would have believed that there was a hostage situation and that plaintiff was of extreme danger to himself or others." Reply Br. 17. The flaw in defendants' theory is that the arresting officers did not know of these allegations of domestic abuse until after they had arrested Lewis. Knowledge obtained after the arrest cannot be used to justify the amount of force used to accomplish that arrest. *See, e.g., EED Holdings v. Palmer Johnson Acquisition Corp.*, 228 F.R.D. 508, 514 (S.D.N.Y.2005) ("Such allegations concerning after-the-fact events are immaterial to . . . state of mind."). Accordingly, we see no error in the District Court's decision not to admit this evidence.

Defendants next challenge the reasonableness of the award of attorneys fees and the decision of the District Court to award costs to Lewis. We review the award of attorneys' fees for abuse of discretion, *see, e.g., Darnet Realty Assocs. LLC v. 136 E. 56th St. Owners, Inc.*, 214 F.3d 79, 87 (2d Cir.2000), and we find none here. The District Court determined that, despite the relative lack of experience of plaintiff's counsel, his competence "was at least equal to, or even exceeded, that of highly experienced attorneys appearing in the Northern District of New York. A reasonable, paying client would be willing to pay $210.00 per hour for an attorney of the competence and skill exhibited by [plaintiff's counsel.]" *Lewis v. City of Albany Police Dep't*, 554 F.Supp.2d 297, 300 (N.D.N.Y.2008). We see no reasonable basis—and defendants have advanced none—to question the District Court's determination. We also reject defendants' assertion that an award of costs was improper in light of the potential availability of pro bono funds. As the District Court explained, "Local Rule 83.3(g) provides a mechanism by which pro bono counsel can be reimbursed for expenses from the district Pro Bono Fund. . . . This provision does not supplant the general rule that costs incurred by the prevailing party may be taxed to the losing parties." *Id.* at 301. We agree.

Having considered all of defendants' arguments on appeal, and having found no merit in any of them, we AFFIRM the judgment of the District Court.

FOR THE COURT,
Catherine O'Hagan Wolfe, Clerk of Court

By s/ Frank Perez

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK DATED APRIL 24, 2008

UNITED STATES DISTRICT COURT,
N.D. NEW YORK.

No. 1:04-CV-152.

Phillip LEWIS,

Plaintiff,

v.

CITY OF ALBANY POLICE DEPARTMENT
and William Bonanni,

Defendants.

April 24, 2008.

MEMORANDUM-DECISION AND ORDER

DAVID N. HURD, District Judge.

I. *INTRODUCTION*

A trial was held on February 25, 26, 27, 28, and March 6, 2008. The jury rendered a verdict on behalf of plaintiff, Phillip Lewis ("Lewis" or "plaintiff"), and against defendant William Bonanni ("Bonanni") finding

that he used excessive physical force in arresting plaintiff on November 23, 2002, thus violating his constitutional rights. However, the jury found that Bonanni did not perform a public strip search of plaintiff as was alleged. The jury also found that Bonanni's conduct in effecting the arrest using excessive force upon Lewis violated plaintiff's right to equal protection of the law due to plaintiff's African-American race. Additionally, the jury found that the City of Albany Police Department ("the City") had a custom, policy, and practice that failed to properly train, supervise, and/or discipline Bonanni, and that failure was a proximate cause of the violations of plaintiff's constitutional rights. The jury found that the violations of plaintiff's constitutional rights was a proximate cause of compensatory or actual damages to him, and awarded him the amount of $65,000.

Further, the jury found that Lewis was entitled to an award of punitive damages against Bonanni. Upon reconvening on March 6, 2008, after hearing closing arguments of counsel for Lewis and Bonanni, the jury returned a verdict awarding plaintiff punitive damages in the amount of $200,000.

The City and Bonanni filed motions for judgment as a matter of law or in the alternative for a new trial pursuant to Fed.R.Civ.P. 50(b) and 59, respectively. Plaintiff opposed. Defendants replied. Oral argument was heard on April 18, 2008, in Utica, New York. Decision was reserved.

II. *STANDARDS*

A. *Rule 50(b) Motion for Judgment as a Matter of Law*

In considering a motion for judgment as a matter of law, the evidence must be considered in the light most favorable to the non-movant, and all inferences must also be drawn in the non-movant's favor. *Nimely v. City of New York*, 414 F.3d 381, 390 (2d Cir.2005). Conflicting evidence cannot be weighed and the witnesses' credibility cannot be judged. *Id.* The judgment of the jury cannot be supplanted. *Id.* The motion may be granted only where there was "no legally sufficient evidentiary basis for a reasonable jury to find" in the non-movant's favor. Fed.R.Civ.P. 50(a); *Nimely*, 414 F.3d at 390. That is, the motion may not properly be granted unless "there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against [the moving party].' " *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 429 (2d Cir.1995) (alteration in original) (quoting *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir.1992)).

B. *Rule 59 Motion for a New Trial*

On a motion for a new trial, "the trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *Bevevino*

v. Saydjari, 574 F.2d 676, 684 (2d Cir.1978). However, the mere fact that the trial judge may not agree with the jury's verdict is no reason alone to grant a new trial. *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 691 (2d Cir.1983). Grant of a new trial is warranted only where the court " 'is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 875 (2d Cir.1992) (quoting *Smith v. Lightning Bolt Produc., Inc.*, 861 F.2d 363, 370 (2d Cir.1988)).

C. *Remittitur*

A jury award of damages for federal constitutional violations will be upheld unless it is "so excessive 'as to shock the judicial conscience.' " *Wheatley v. Ford*, 679 F.2d 1037, 1039 (2d Cir.1982). If the award is found to be grossly excessive, a plaintiff may be ordered "to remit excessive damages or undergo a new trial." *Id.* It is appropriate to review the awards in comparable cases in determining a motion for remittitur. *Martinez v. Port Authority of N.Y. & N.J.*, No. 01 Civ 721, 2005 WL 2143333, at *19 (S.D.N.Y. Sept. 2, 2005) (citing *Gardner v. Federated Dep't Stores, Inc.*, 907 F.2d 1348, 1353 (2d Cir.1990)), *aff'd*, 445 F.3d 158, 160 (2d Cir.2006) (per curiam). It is appropriate to consider inflation when comparing prior jury verdicts and remittitur orders. *Id.* at *20 & n. 9 (using United States Bureau of Labor Statistics calculator found at *http:// data. bls. gov/ cgi-bin/ cpicalc. pl* as a "crude adjustment mechanism" to upwardly adjust awards for comparison purposes),

see also Martinez, 445 F.3d at 160 (finding no error in the district court's remittitur analysis).

The propriety of the amount of a punitive damages award likewise is not disturbed unless it shocks the judicial conscience. *Patterson v. Balsamico*, 440 F.3d 104, 120 (2d Cir.2006). However, the following factors must be considered in the analysis: "(1) the degree of reprehensibility of the tortious conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* (internal quotation omitted).

III. *DISCUSSION*

Defendants make multiple arguments in support of their motions for judgment as a matter of law or in the alternative for a new trial and/or remittitur. These arguments can be categorized as challenging pre-trial rulings (admission of prior complaints and perjury charge, bifurcation, and jury selection), sufficiency of evidence (excessive force, equal protection, and municipal liability), jury instructions (oral addition to verdict form and lack of a qualified immunity charge), and amount of damages awarded, and will be addressed in this order rather than as presented by either defendant.

Appendix B

A. *Admissibility of Evidence*

1. *Prior Complaints*

Defendants argue that admission of prior complaints of use of excessive force against African-American suspects by Bonanni constituted error sufficient to justify overturning the verdict of the jury. Pursuant to Rule 61 of the Federal Rules of Civil Procedure, an error in the admission of evidence is grounds for overturning a jury verdict only where letting the verdict stand would be inconsistent with substantial justice. Fed.R.Civ.P. 61. Where an error "does not affect the substantial rights of the parties," it must be disregarded. *Id.*

The prior complaints were properly admitted under Federal Rule of Evidence 404(b) with regard to Bonanni's identity, since, as he himself points out, his defense was that he did not participate in the physical arrest or use any force against plaintiff. Rather, Bonanni's contention throughout the proceeding was that he was in a vehicle down the block during Lewis's arrest. The circumstances alleged in the prior complaints are strikingly similar to those in this case–that Bonanni used excessive force upon the heads of handcuffed African-American suspects. Additionally, the prior complaints were admissible to establish Bonanni's motivation and intent with regard to the use of force against Lewis (should the jury determine, as to that he was one of the officers who used excessive force against plaintiff) because plaintiff is African-American. Therefore, the prior complaints were relevant both as

to Bonanni's identity as a participant in the use of excessive force and as to his motivation and intent for using such force against an African-American. *See* Fed.R.Evid. 404(b).

Bonanni argues that admission of the prior complaints was prejudicial because the ultimate verdict likely was based upon unrelated events in the prior complaints and that the jury may have inferred that he was an "evil person" because of the complaints. However, if the jury credited the testimony of three police officers that Bonanni was not even involved in the physical arrest of the plaintiff, it would then have had to completely ignore their version (and Bonanni's) of the events in order to base its verdict upon the prior complaints or any inference that he was an evil person. In other words, in order for defendant's proposition to stand up, the jurors would have had to, first, believe the officer witnesses' testimony that Bonanni was not even physically present at the arrest, and, second, disregard that testimony which they believed. This is far too speculative a ground upon which to base a finding of prejudice sufficient to substantially outweigh the probative value of the prior complaints. The substantial probative value of the relevant prior complaints is not substantially outweighed by the speculative danger of unfair prejudice, particularly given the limiting instructions to the jury. *See* Fed.R.Evid. 403, 105.

Further, the complaints in Bonanni's personnel file were relevant with regard to Lewis's *Monell* claims against the City. Their significant probative value as to

whether the City failed to take proper steps in light of Bonanni's multiple alleged violations of African-American suspects' constitutional rights was not outweighed by a danger of unfair prejudice, especially in light of the limiting instructions given. *See* Fed.R.Evid. 403, 105.

The City contends that as a general principle unsubstantiated or unfounded complaints are inadmissible against a municipality, citing *Berkovich v. Hicks*, 922 F.2d 1018, 1022-023 (2d Cir.1991). In that case the plaintiff, Berkovich, alleged civil rights violations related to his arrest, including a claim under *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The trial court denied discovery of prior civilian complaints and excluded all evidence relating to them at trial. *Berkovich*, 922 F.2d at 1021. Assuming without deciding that it was error to deny discovery of the complaints, the appellate court found that any resulting error was harmless because the complaints, all but one of which exonerated the defendant at issue, held minimal probative value. *Id.* at 1022. The Second Circuit found no abuse of discretion in the exclusion of the history of complaints at trial. *Id.* The court noted that under its " 'inclusionary' approach" to Rule 404(b), evidence of prior wrongful acts may be admitted for other relevant purposes except propensity. *Id.* The inclusion of such evidence, other than to prove propensity, is subject to the Rule 403 balance between probative value and, inter alia, unfair prejudice. *Id.* (noting that the "broad reach of th[e] 'inclusionary' approach" permits admission of evidence

for any relevant purpose except propensity so long as unfair prejudice does not substantially outweigh probative value). The court rejected each of Berkovich's arguments of relevance. *Id.* at 1022-23. Here, however, the relevant prior complaints had substantial probative value in that only one exonerated Bonanni and all were of sufficiently similar circumstances to merit admission to prove his modus operandi and the City's failure to discipline, train, and supervise him. *Cf. id.* (finding evidence lacking relevance, and therefore of minimal probative value, where the defendant was exonerated as to six of the seven prior complaints and there was no pattern to connect prior complaints to the current alleged acts). Thus, the admission of the prior complaints against Bonanni was not inconsistent with the Second Circuit's approach in *Berkovich.*

The prior complaints were properly admitted as against Bonanni to prove identity, motive and intent, and modus operandi, and as against the City as evidence of whether it failed to discipline, train and supervise Bonanni.

However, even if it was error to admit the prior complaints, such error would not be sufficient to overturn the jury verdict. Limiting instructions were given to the jury at the time the complaints were introduced into evidence, as well as in the final charge subsequent to the conclusion of the proof and the parties' arguments. Therefore, if there was error it did not affect the substantial rights of the parties, and letting the verdict stand is not inconsistent with substantial justice. *See* Fed.R.Civ.P. 61.

Appendix B

2. *Perjury Charges*

Bonanni argues that the departmental records referencing perjury charges[1] brought against him in 1998 by a Special Prosecutor should not have been admitted into evidence, and further that since they were admitted he should not have been prevented from testifying as to the outcome of those charges. He contends that these errors were prejudicial because he relied in part on his own testimony to convince the jury that he did not physically participate in the arrest but rather was in a vehicle when Lewis was taken into custody.[2] He further argues that the probative value of the records was questionable.

The departmental records referencing perjury charges against Bonanni were received in evidence only against the City relating to the charges of failure to discipline, train, or supervise. There were no departmental records indicating a disposition of the perjury charges. Perjury charges against Bonanni with no disposition in departmental records were relevant to Lewis's claim that the City failed to discipline, train,

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1. The charges alleged that Bonanni and another officer committed perjury in testimony regarding the one complaint of excessive force against Bonanni that was substantiated.

2. He also relied upon the testimony of at least three of his fellow officers that he was not present at the physical arrest of plaintiff. The perjury charges and prior complaints had nothing to do with their testimony. Apparently, the jury also disbelieved the fellow officers' testimony as it did Bonanni's.

or supervise Bonanni, the purpose for which they were admitted. The probative value of this relevant evidence was not outweighed by a danger of undue prejudice and therefore was properly admitted. Bonanni proffered his own testimony that he was exonerated of the charges, with no background as to proceedings that led to his exoneration. Moreover, aside from the fact that such testimony would be self-serving, the best evidence of a disposition of the charges is the record. Here, there was no documentation of any proceedings or disposition of the charges. Accordingly, it was proper to preclude Bonanni from testifying regarding a disposition of the charges.

B. *Bifurcation*

Defendants argue that it was error to deny the City's motion to bifurcate the trial. The principle basis upon which defendants contend that the claims against Bonanni and the City should have been tried separately is that the evidence of prior complaints admitted for the purposes of proving the claims against the City misled the jury in its consideration of the claims against Bonanni.

The presumption is that all claims will be tried together, unless special and persuasive reasons constituting exceptional circumstances exist. *Jeanty v. County of Orange,* 379 F.Supp.2d 533, 549 (S.D.N.Y.2005). A bifurcated trial may be appropriate "in order to (1) avoid prejudice; (2) provide for convenience; or, (3) expedite the proceedings and be

economical." *Ismail v. Cohen*, 706 F.Supp. 243, 251 (S.D.N.Y.1989). The burden is upon the moving party to establish that bifurcation is appropriate. *DeVito v. Barrant*, No. 03-CV-1927, 2005 WL 2033722, at *11 (E.D.N.Y.2005). The prior complaints were admissible as against Bonanni on the excessive force claim for the limited purpose of establishing identity, which he brought in issue, and on the equal protection claim to establish motive, intent, and modus operandi. They were also admissible against the City on the *Monell* claim. Limiting instructions were given at the time the evidence was introduced and at the conclusion of the trial, reducing the possibility of any prejudice to defendants. Moreover, trying all the claims together would promote convenience, expedite the proceedings, and preserve judicial resources. *See DeVito*, 2005 WL 2033722, at *11 (noting that bifurcation "could cause a waste of judicial resources if witnesses and evidence must be presented twice").

C. *Jury Selection*

The City argues that disqualification of two[3] potential jurors for cause based upon their employment in the law enforcement field and the refusal to strike for cause a female juror suffering from generalized anxiety disorder were errors justifying a new trial.

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3. The City's motion papers refer to three jurors excused because of their work in law enforcement. However, there were only two such jurors.

Appendix B

The City contends that the two people working in law enforcement stated that they could fairly and impartially weigh the evidence without bias or prejudice. However, their demeanor and actions during jury selection demonstrated that they could not be fair and open-minded in this case, including some of their answers to questions involving their law enforcement experiences. There was no error in dismissing these jurors for cause upon plaintiff's motion to do so.

As to the anxious juror, she stated that she understood that the trial process would not be confrontational to her and that she could work through her anxiety. She answered all of the questions during voir dire. Moreover, the defendants used a peremptory challenge. This juror was dismissed and did not serve on the jury. The City contends that requiring it to use one of three peremptory challenges shared by the two defendants for this juror limited the defendants' ability to empanel a fair and impartial jury. However, the City does not state how the use of this challenge limited the ability to empanel a fair and impartial jury. Additionally, counsel for both defendants indicated that the jury was satisfactory to them.

There was no error in the jury selection process.

Appendix B

D. *Weight of Evidence*

1. *Excessive Force*

Defendants point to testimony from Bonanni and three other officers to the effect that Bonanni was in a patrol vehicle down the block at the time of plaintiff's apprehension. They also point to the medical reports which allegedly showed minimal injuries suffered by plaintiff.

Lewis testified that, while he was on the pavement, in handcuffs, first one officer, and then Bonanni stepped on his head with his full weight and ground plaintiff's face into the pavement. Plaintiff's treating physician testified that he suffered abrasions and a contusion to his face and a closed head injury. Photographs admitted in evidence, although taken after he was treated, showed the injuries to plaintiff's face. This evidence, if credited, was a sufficient basis upon which the jury could find that Bonanni used excessive force upon Lewis.

Defendants also point to evidence such as medical records of de minimis injuries, Lewis admitting he assaulted the complainant and damaged his girlfriend's property, among other things, to support their argument that the amount of force used was appropriate. This argument is inapposite because the threshold issue was whether Bonanni participated in plaintiff's physical arrest or not. According to Bonanni and the other officers, he did not. If this were believed, then the excessive force claim would be decided in favor

of defendant, with no consideration of the amount of force used. Similarly, if Lewis's version were believed, the issue would be decided in plaintiff's favor because under no circumstances could it be said that stepping on the head of an under control, handcuffed suspect laying on the ground, and grinding his face into the pavement was a proper, reasonable use of force.

The jury's verdict demonstrated that it credited Lewis's version of events, rather than Bonanni's or the other officers. The verdict on the excessive force claim against Bonanni was not seriously erroneous or a miscarriage of justice, and a new trial is not warranted.

2. ***Equal Protection***

Bonanni contends the jury's finding against him on the equal protection claim was against the weight of the evidence because plaintiff merely introduced the prior complaints from his personnel file. Plaintiff did introduce into evidence the prior complaints against Bonanni. Every complaint was made by an African-American-100%. Bonanni testified that only 65% of the arrests he made were of African-Americans. The complaints were also very similar factually, such as kicking or hitting a handcuffed African-American suspect in the head. Further, there appeared to be no motivation other than race for Bonanni to assault the handcuffed Lewis in this manner. The jury's verdict on the equal protection claim against Bonanni was also not seriously erroneous or a miscarriage of justice, and a new trial is not warranted.

Appendix B

3. *Failure to Discipline, Train, or Supervise*

The City argues that the only evidence presented to support plaintiff's claim for failure to discipline, train, or supervise was the seven prior complaints, only one of which substantiated misconduct by Bonanni. The City points to evidence that it contends shows that it did properly discipline, train, and supervise Bonanni: he was required to participate in yearly in-service training including use of force, constitutional rights, and racial sensitivity; and its handling of the one substantiated complaint (turned matter over to the District Attorney, suspended Bonanni, mandated in-service training when Bonanni returned to work after acquittal).

All of the in-service training the City provided to Bonanni was the same training it required of all officers. Documentary evidence established that in a single year Bonanni was responsible for 10% of excessive force complaints against the City, which employed over 330 police officers. Additionally, all of the excessive force complaints against Bonanni were filed by African-Americans, who alleged strikingly similar misconduct. Despite having this information, the City did not require Bonanni to undergo additional training, no additional supervision was provided, and no written or verbal warnings were given. Further, the City's purportedly adequate response to the substantiated complaint of excessive force (assaulting a handcuffed African-American suspect) could be viewed as supporting Lewis's claim that the City failed to discipline, train, and supervise Bonanni. The City initiated a disciplinary

proceeding and suspended Bonanni from the police force when the complaint of an assault on a suspect was substantiated. A grand jury indicted Bonanni for assaulting the suspect. The City police department initiated departmental charges against Bonanni, which recommended termination. Bonanni was acquitted of the criminal charges related to that incident. The City then reinstated Bonanni with full back pay and benefits for the 2-1/2 years he was suspended. Upon his reinstatement, the City required only the same in-service training that would be required of any other officer, and there was no evidence that the City instituted any special supervision. The City has no record of the resolution of the departmental assault charges brought against Bonanni.

In addition to the charges related to the assault, a special prosecutor brought charges against Bonanni and another officer alleging that they had committed perjury in testimony given regarding the assault alleged in the substantiated complaint. Departmental charges of perjury were also brought, again with a recommendation of dismissal. The City did not require any special training or supervision based upon the allegations of perjury. Again, the City failed to produce any record of the resolution of the criminal or departmental perjury charges.

The jury verdict finding that the City had a custom, policy, and practice that failed to properly train, supervise, and/or discipline Bonanni was not seriously erroneous. A new trial is not necessary to prevent a miscarriage of justice.

Appendix B

E. *Oral Addition to Verdict Form*

The City argues that an oral addition to the verdict form during the explanation of Question One was a fundamental error of law requiring a new trial. This argument is based in large part on the assertion that it was error to admit the prior complaints of excessive force against African-American suspects against Bonanni. As discussed in detail above, the prior complaints were properly admitted for the limited purposes as the jury was instructed. Thus, to the extent that the City's motion in this regard is based upon error in admitting prior complaints it must be denied.

Additionally, the City misapprehends the explanation with regard to Question One. The explanation clearly set forth the limited purpose for which the jury could consider the prior complaints with regard to this question–the *identity* of Bonanni as the officer who stepped on plaintiff's head, while he was handcuffed on the pavement, and ground plaintiff's face into the pavement. The explanation did not suggest that the jury use the prior complaints in its consideration of whether the *amount* of force used was excessive; in fact, the jury was instructed that if it found that the events occurred as plaintiff testified, then the amount of force used was excessive as a matter of law.

The City further argues that even if the jury believed that Bonanni participated in the physical arrest of Lewis, it could have found that given the circumstances of the apprehension and plaintiff's resulting injuries, the

amount of force used was not excessive. To the contrary, there are no circumstances that would justify the force used in Lewis's version of events, that Bonanni stepped on Lewis's head with his full weight and ground his face into the pavement, while Lewis was under control and handcuffed on the ground. Further, Bonanni did not testify that he used some other amount or type of force-he testified that he was in a vehicle at the time of the incident, and the explanation to the jury included this fact. The City cannot now rely upon a hypothetical version of events about which there was no evidence at trial as grounds for a new trial.

The City also objects to the amendment of page 22 of the jury charge to eliminate "for the sole purpose" from the instruction about the jury's limited consideration of prior civilian complaints with regard to claims against the City. It was clear from the limiting instructions given during the course of the trial that the prior complaints could be considered with regard to Bonanni's identity and motive as to the claims against him. Removing the "for the sole purpose" language from the written charge given to the jury merely reflected the limits of their use of the prior complaints as a whole.

F. *Qualified Immunity*

Defendants argue that it was error as a matter of law to deny the request to charge the jury on qualified immunity. They contend that the jury should have been permitted to determine if Bonanni's actions were reasonable in light of the circumstances.

Appendix B

Qualified Immunity insulates a governmental official performing discretionary functions from liability so long as his " 'conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Eng v. Coughlin,* 858 F.2d 889, 895 (2d Cir.1988) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Qualified immunity also protects public officials from liability when it was objectively reasonable for them to believe that their actions did not violate a plaintiff's constitutional rights. *Martinez v. Simonetti,* 202 F.3d 625, 634 (2d Cir.2000). Legal questions pertaining to qualified immunity, such as whether violation of a federally protected right has been asserted, whether the asserted right was clearly established, and whether the facts "demonstrate the objective reasonableness of the public official's conduct," are for the court and not the jury. *Id.* at 632.

The issue is not whether plaintiff had a clearly established constitutional right to be free from the use of excessive force during arrest. Rather, the issue is whether it could have been objectively reasonable for Bonanni to believe that his actions did not violate Lewis's constitutional rights. The two versions of events about which there was evidence in this case were (1) Bonanni, as he testified, was in a vehicle and did not participate in the physical arrest of plaintiff; and (2) Bonanni, as Lewis testified, stepped on a handcuffed, prone Lewis's head and ground his face into the pavement. In Bonanni's version, qualified immunity is not an issue because he was not even involved in the physical arrest.

Thus, the issue only need be considered if Lewis's version was credited. Put simply, no police officer could reasonably believe that stepping on the head of an already-handcuffed, prone suspect and grinding his face into the pavement would not violate the suspect's right to be free from excessive force, regardless of the other surrounding circumstances. As a matter of law Bonanni was not entitled to qualified immunity and there was no error in denying a request to charge the jury on that defense.

G. *Amount of Damages*

Defendants argue that both the compensatory and punitive damages awards are excessive. They contend that a new trial must be ordered unless plaintiff agrees to a remittitur.

1. *Compensatory*

Lewis testified that he was in significant physical pain during the time that Bonanni stood on his head and ground his face into the pavement. He yelled, to no avail, for Bonanni to stop. He felt extremely traumatized, degraded, and humiliated by the assault, which occurred on a public street in front of many neighborhood people. During the assault by Bonanni, pebbles and asphalt from the road were ground into the skin on plaintiff's face. The skin was abraded, plaintiff's face swelled, and a contusion formed. Medical records and testimony from the treating physician documented these injuries. The treating emergency room physician also diagnosed a

closed head injury and gave plaintiff instructions regarding the closed head injury. Additionally, photographs of plaintiff's face, taken after he was treated at the hospital show the injuries. Plaintiff also testified that the pain and swelling from the physical injury lasted for several weeks. He suffered from headaches, difficulty sleeping, and nightmares for months. He described in some detail his nightmares which involved Bonanni standing on his head and smirking at him.

The jury awarded Lewis $65,000 in actual damages to compensate him for the physical and emotional injuries he suffered as a result of the assault by Bonanni. The City argues that the plaintiff's alleged injuries lacked any credible basis and therefore should be reduced to $1.00 nominal damages. It contends that his headaches, right eye blindness, and closed head trauma were caused by his history of glaucoma and fist-fights, not the assault by Bonanni. Credibility of the testimony is the province of the jury. Here there was sufficient evidence for the jury to determine that Lewis suffered injuries requiring compensation of more than nominal damages. Additionally, it is purely speculative, and not supported by any evidence, that plaintiff's headaches and closed head trauma were caused by some preexisting conditions. The right eye blindness admittedly was caused by glaucoma, and plaintiff did not seek, nor did the jury award, damages for blindness.

Bonanni argues that any mental anguish caused by the fact of plaintiff's arrest alone cannot be compensated.

He also argues that Lewis's nightmares may have been caused by previous incidents with the police and therefore would not be compensable. There is no evidentiary basis for either of these arguments. Therefore, they are summarily rejected.

Next Bonanni argues that Lewis's proof of causation failed in that he did not have an expert testify that the injuries plaintiff attributed to the assault by Bonanni actually were caused by Bonanni, and not Officer Shanahan, who according to plaintiff's testimony stood on his head for a number of seconds before Bonanni did. This argument is unavailing. First, Bonanni never requested that the jury be instructed to allocate the physical injury component of actual damages between him and Officer Shanahan. Second, plaintiff testified that he was in significant pain while Bonanni was standing on his head grinding his face into the pavement. Further, he specifically related nightmares occurring months after the assault in which he dreamed that Bonanni was again standing on his head, then smirking.

Bonanni also argues that there was a risk of significant duplication for different torts against different defendants. The jury found that Bonanni violated Lewis's constitutional rights by using excessive force because of race, causing plaintiff actual injuries. The jury further found that the City had a custom, policy, and practice that failed to properly train, supervise, and/or discipline Bonanni, which was a proximate cause the violations of plaintiff's constitutional rights. There were no duplicative torts and no risk of damages

inflation--the City's failure was a proximate cause of Bonanni's infliction of injuries upon plaintiff. Therefore, the City and Bonanni are both responsible for the injuries suffered by plaintiff.

Bonanni contends that the compensatory damages award was too high when compared to damages awarded in similar cases. He cites several cases in support of his position.[4] *See Wheatley,* 679 F.2d at 1039-40 (remanding for remittitur to $25,000 from jury award of $55,000 where plaintiff's injury evidence was sketchy and his discomfort was short-lived); *Hynes v. LaBoy,* 887 F.Supp. 618, 626 (S.D.N.Y.1995) (finding no inadequacy in jury award of $1,500 for injuries of two cuts that required stitches and a black eye, which amounted to $250 per day for pain and suffering from the time of the injury to medical discharge from prison infirmary, after noting that due deference must be given to the jury's fact-finding); *Jones v. Huff,* 789 F.Supp. 526, 536-37 (N.D.N.Y.1992) (noting that the corrections officer who inflicted most of plaintiff's injuries was not a defendant,

4. Bonanni also cites *Fiacco v. City of Rensselaer,* 783 F.2d 319, 322, 324, 332-33 (2d Cir.1986) in support of a remittitur. He describes the plaintiff's injuries, but misstates that the *Fiacco* court declined to review the district court's remittitur order inferring that the remittitur order was proper. Actually, the *Fiacco* court found that because Fiacco accepted the remittitur order thereby consenting to the reduced award she could not challenge the remittitur order on appeal. The District Court had ordered a remittitur to $25,000 where plaintiff suffered scratches and bruises, required surgery to repair a tendon in her finger, and required an arm brace. *Id.*

court awarded a total of $9,500 (apportioned among three defendants) for Eighth Amendment violations including slaps, punches, forcible stripping, and failure to intervene as plaintiff was beaten by other officers). Inflation adjustment must be made so that a meaningful comparison can be accomplished. Using the United States Bureau of Labor Statistics calculator, *see Martinez*, 2005 WL 2143333, at *20 & n. 9, yields the following: *Wheatley*, $54,843.75; *Hynes*, $2,083.59; *Jones*, $14,334.17, *Fiacco*, $48,287.64.

Plaintiff sets forth the following cases for comparison. In *Mendoza v. City of Rome*, 872 F.Supp. 1110, 1126 (N.D.N.Y.1994), a jury awarded compensatory damages of $200,000, on claims of false arrest, excessive use of force, and assault. There plaintiff suffered bruises and swelling of his knee, bruises to his forehead, headaches, and numbness to his wrists and hands. *Id.* at 1120. The injuries were not permanent. *Id.* Plaintiff also suffered shame, humiliation, and embarrassment. *Id.* at 1120-21. A remittitur to $62,500 ($89,276.74 when adjusted for inflation) was ordered.

An award of $190,000 was reduced to $100,000 where plaintiff sustained a laceration requiring several stitches and pain in his head in an assault. *Nash v. Sue Har Equities, LLC*, 45 A.D.3d 545, 546, 846 N.Y.S.2d 215 (N.Y.App. Div.2d Dep't 2007). The plaintiff's injuries were not permanent. *Id.* Notably, the *Nash* Court was applying the more stringent material deviation from reasonable compensation standard applicable in New York State courts. *See Patterson*, 440 F.3d at 119.

Appendix B

In *Morales v. City of New York*, No. 99 Civ. 10004, 2001 WL 8594, at *7 (S.D.N.Y. Jan. 2, 2001), plaintiff suffered dark bruises and traumatization during her lawful arrest. Although her injuries were not permanent, she required counseling for several months. The jury's award of $2.75 million shocked the conscience of the court, which ordered a remittitur to $50,000 ($59,766.52 adjusted for inflation), *Id.* at *10.

In *Bender v. City of New York*, 78 F.3d 787, 792 (2d Cir.1996) the plaintiff suffered "a physical blow to the mouth that resulted in no bruise or cut, much less any permanent injury; 24 hours' confinement in a cell under extremely unpleasant conditions; an additional five hours of custody prior to release at arraignment; the pendency of disorderly conduct and assault charges for six months, prior to their dismissal; and emotional distress to the plaintiff that was manifested by nightmares and occasional loss of sleep over a period lasting a year and a half" as a result of various police misconduct. The jury awarded an aggregate of $300,700 against multiple defendants, which the Second Circuit found to be excessive, *Id.* However, only the intentional infliction of emotional distress component of $150,000 was challenged on appeal. *Id.* at 795. The court ordered a new trial unless the plaintiff agreed to remit $150,000. *Id.* After the remittitur, the damages award was $150,700 ($203,327.82 adjusted for inflation).

In *Becker v. City of New York*, 192 Misc.2d 194, 200-01, 745 N.Y.S.2d 857 (N.Y.City Civ.Ct.2002), plaintiff suffered multiple lacerations requiring sutures to his

face and head, multiple facial contusions, and swelling of one eye and both cheeks after being assaulted by a police officer. He also suffered humiliation and fright. *Id.* at 201, 745 N.Y.S.2d 857. He was in the hospital for three days, and currently has a scar on his nose. *Id.* The court found that the jury award of *209 $250,000 for past pain and suffering was "beyond what is reasonable compensation for" plaintiff's injuries. *Id.* The award was reduced to $150,000 ($176,508.89 adjusted for inflation). *Id.*

Finally, plaintiff cites *Bert v. Port Authority of N.Y. & N.J.*, 166 A.D.2d 351, 561 N.Y.S.2d 416 (N.Y.App. Div. 1st Dep't 1990). In *Bert* three police officers assaulted and arrested plaintiff, in an incident with racial overtones. *Id.* at 351, 561 N.Y.S.2d 416. Although he was detained only for a few hours and suffered no substantial mental or physical injury, he was subjected to "abject humiliation . . . in the presence of young and impressionable members of his family." *Id.* at 352, 561 N.Y.S.2d 416. Accordingly, the appellate court upheld the remittitur to $100,000 ($161,968.63 adjusted for inflation) which plaintiff had accepted. *Id.* at 351-52, 561 N.Y.S.2d 416.

Upon close consideration of the evidence presented at trial, the racial motivation of Bonanni's excessive use of force, and the cases cited by the parties while giving due deference to the finding of the jury, the compensatory damages award of $65,000 in this case does not shock the judicial conscience. Accordingly, no remittitur is appropriate.

2. *Punitive*

The City seeks to have the jury's punitive damages reduced to the nominal amount of $1.00. The City argues that any additional amount will have no deterrent effect upon Bonanni since the City will indemnify him for the award and negative publicity regarding the case provided sufficient deterrence. The City has produced no authority for the proposition that a punitive damages award should be reduced to a nominal amount on the basis of an indemnification agreement. That proposition is rejected. The City relies upon *Schwenk v. Kavanaugh*, 4 F.Supp.2d 116 (N.D.N.Y.1998), where punitive damages of $1.00 were awarded because negative publicity provided sufficient deterrence. In *Schwenk*, the defendant was an elected public figure (district attorney), and news about the trial was widely disseminated in legal publications. That situation is not at all analogous to the situation here–a police officer used excessive force upon a handcuffed African-American lying on the street, because of the man's race.

Bonanni argues that the punitive award is higher than necessary to achieve the purpose of deterrence due to jury passion or bias, especially where the individuals at whom the deterrence is directed are law enforcement officials responsible for the socially beneficial activities of preventing and stopping criminal behavior. The passion and bias Bonanni suggests played a role in the jury award resulted from the testimony and documents admitted at trial. It has been decided that there was no error in admitting the prior complaints and perjury

charges. Moreover, it is particularly important to further the goal of deterring defendants such as Bonanni from participating in violations of constitutional rights given their positions of public trust, as defendant points out, with the socially beneficial goal of preventing criminal activity. Thus, this is not an adequate basis for eliminating the punitive damages award.

Bonanni also argues that the ratio of punitive damages to compensatory damages–because there was a substantial award of compensatory damages the punitive award should be no more than an equal amount. Because Bonanni's use of excessive force against Lewis was racially motivated and occurred while plaintiff was handcuffed, it is particularly reprehensible. Further, the punitive damages award is three times the amount of compensatory damages, an acceptable ratio. *See Patterson,* 440 F.3d at 121 (noting that a punitive damages award of " 'more than 4 times the amount of compensatory damages' " has been upheld by the United States Supreme Court (quoting *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 23-24, 111 S.Ct. 1032, 1046, 113 L.Ed.2d 1 (1991))). Finally, a comparison of the difference between this award and those from comparable cases leads to the conclusion that this jury's $200,000 award of punitive damages is not so grossly excessive as to shock the judicial conscience. *See, e.g., Ismail v. Cohen,* 899 F.2d 183, (2d Cir.1990) (upholding $150,000 punitive damage award [$242,952.95 adjusted for inflation]); *O'Neill v. Krzeminski,* 839 F.2d 9, 13-14 (2d Cir.1988) (finding, in an excessive force case where handcuffed suspect was repeatedly struck on the head

by law enforcement officers, punitive damage award totaling $185,000 [$331,049.92 adjusted for inflation] against the two defendants not excessive).

IV. *CONCLUSION*

There was no error in the rulings pertaining to the admission of prior complaints and perjury charges, bifurcation, or jury selection. The jury's verdict was not against the weight of the evidence as to the excessive force, equal protection, or municipal liability claims. The purported oral addition to the verdict merely reiterated the instruction previously given to the jury. Bonanni was not entitled to qualified immunity as a matter of law if the jury credited Lewis's version of events, so there was no error in denying the request to include a qualified immunity charge. The jury awards of $65,000 in compensatory damages and $200,000 in punitive damages do not shock the judicial conscience.

Accordingly, it is

ORDERED that

1. Defendant William Bonanni's post-trial motions are DENIED;

2. Defendant the City of Albany Police Department's post-trial motions are DENIED;

3. Plaintiff may file and serve an application for attorneys fees and costs pursuant to 42 U.S.C. § 1988 on or before May 1, 2008; and

4. Defendants may file and serve an answer on or before May 8, 2008.

The application will be taken on submit without oral argument, and a final judgment will be entered thereafter.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Number: 08-2722-cv

Phillip Lewis,

Plaintiff-Appellee,

v.

City of Albany Police Department, William Bonnani,

Defendants-Appellants.

Appellants City of Albany Police Department, William Bonnani having filed a petition for rehearing or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

Appendix C

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Frank Perez
Frank Perez, Deputy Clerk